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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

RONALD W. REAGAN, *et al.*, *Petitioners*,

—v.—

JAMES ABOUREZK, *et al.*, *Respondents*.

GEORGE P. SHULTZ, *et al.*, *Petitioners*,

—v.—

CITY OF NEW YORK, *et al.*, *Respondents*.

GEORGE P. SHULTZ, *et al.*, *Petitioners*,

—v.—

BRUCE CRONIN, *et al.*, *Respondents*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICI CURIAE* LAWYERS COMMITTEE FOR HUMAN RIGHTS, AMERICAS WATCH, THE AUTHORS LEAGUE OF AMERICA, INC., COMMITTEE TO PROTECT JOURNALISTS, FUND FOR FREE EXPRESSION, HELSINKI WATCH, THE NEWSPAPER GUILD, PEN AMERICAN CENTER, AND THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

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INTEREST OF AMICI

Lawyers Committee for Human Rights

The Lawyers Committee for Human Rights is a legal resource center in the areas of human rights and refugee law. Among the human rights it seeks to promote are the freedoms of persons to travel, speak and associate with others. The Lawyers Committee represents Choichiro Yatani, a Japanese scholar who was detained by immigration authorities for 44 days in July and August of 1986 on account of alleged involvement with a subversive organization, and Patricia Lara, a Colombian journalist who was excluded from the United States on ideological grounds without a hearing in October of 1986.

Americas Watch

Americas Watch is a U.S. citizens organization, founded in 1981, that monitors and promotes human rights in South America, Central America and the Caribbean. Among the questions of central concern to us are freedom of expression and freedom of movement. Americas Watch considers that its capacity to persuade other governments in the Western Hemisphere to respect freedom of expression and freedom of movement depends to a considerable extent on respect for those rights by the United States. If the United States itself does not respect those rights, a U.S.-based citizens group lacks credibility in attempting to persuade other governments to respect them.

Because many of those excluded from the United States on ideological grounds are prominent intellectuals and political leaders from Latin America, this is a matter of great concern in the region in which Americas Watch attempts to promote freedom of expression and freedom of movement.

Authors League of America, Inc.

The Authors League of America, Inc. is the national society of professional authors, representing more than 14,600 authors, dramatists, and journalists. The League counts among its membership both writers who live outside the United States and those who are citizens of other nations. The League links with writers' organizations in other countries, in pursuit of the interests common to all writers.

One of the League's principal purposes is to convey its members' views in cases involving fundamental questions of freedom of expression, and to support that fundamental Constitutional right. Barring the entry of a non-immigrant visa applicant on political grounds violates the most fundamental right to freedom of expression and has far-reaching implications for writers. In the past, the League has protested the attempted and actual ideological exclusions of such writers as Dennis Brutus, Dario Fo, Farley Mowat, and Angel Rama, and the League continues to protest the current deportation and exclusion of writers Margaret Randall and Patricia Lara.

Because determination of the issues presented on this appeal may affect seriously the First Amendment

rights of authors, dramatists, and journalists to receive information and to create their literary, dramatic, and reportorial works in an uninhibited marketplace of ideas, the League joins in the filing of this brief.

Committee to Protect Journalists

The Committee to Protect Journalists was founded in 1981 by several U.S. journalists who sought to use the very substantial influence of the U.S. press to mobilize support for journalists and news organizations around the world that were under attack. It does casework (uncovering, investigating, protesting and publicizing approximately 300 cases in 1986), provides an information service for the press, publishes a newsletter and sends delegations to countries where the press is in jeopardy.

Moreover, it launches campaigns that include 25 human rights and press groups around the world.

CPJ is not merely a fraternal organization for journalists; rather, it seeks to create a climate in which the press worldwide can gather and present news that enhances public awareness and keeps governments accountable.

It is concerned about the ongoing pattern of exclusion by the U.S. government of various individuals among whom are journalists. We find the practice distinctly contrary to the right to freedom of expression, and therefore dangerous to the concepts on which this country was founded.

Fund for Free Expression

The Fund for Free Expression was founded in 1975 by a group of authors, publishers, journalists and other interested individuals to champion the right of their counterparts the world over to express themselves freely without fear of retribution -- a right proclaimed in the Universal Declaration of Human Rights. Since its formation, the Fund for Free Expression has also been concerned with the right of individuals to travel -- the right of Americans to travel abroad and the right of foreign nationals to visit the United States, rights also proclaimed in the Universal Declaration of Human Rights and guaranteed in the Helsinki Accords and other international agreements.

In 1980, the Fund for Free Expression became the coordinating

agency for a brief presented to the then-sitting Select Commission on Immigration and Refugee Policy. The brief, entitled "The Case for Repeal," urged repeal of the McCarran-Walter Act, which has been used to deny visas to foreign nationals because of their ideological beliefs. In 1984, the Fund became a sponsoring agency of a newly formed coalition, Free Trade in Ideas, a coalition of over fifty national professional organizations. The Free Trade in Ideas project is dedicated to the repeal of McCarran-Walter and underscores the fact that denial of visas to foreign nationals to visit the United States because of their political beliefs further deprives Americans of their First Amendment right -- the right to hear expressions of all points of view.

Helsinki Watch

The U.S. Helsinki Watch Committee is a citizens' organization created in 1979 that promotes compliance in the thirty-five signatory nations with the human rights provisions of the 1975 Helsinki Accords, including the provisions that are intended to facilitate the free flow of people, information and ideas across national boundaries. Helsinki Watch joins this brief in order to promote the human rights standards embodied in the Helsinki Accords.

Newspaper Guild

The Newspaper Guild is a trade union representing 40,000 employees of newspapers, magazines, wire services and related enterprises in the United States, Canada and Puerto Rico. It has

been actively involved in protecting the First Amendment rights of its members and all Americans. It has protested the exclusion and/or detention of foreign news correspondents on ideological grounds without hearings, including the recent exclusion of Patricia Lara, a Colombian journalist, and the detentions of Olga Behar, another Colombian journalist, and Tom Ronse, a Belgian journalist.

PEN

PEN American Center is a non-partisan, non-profit organization with a membership of over 2,000 writers. It is affiliated with International PEN: a world-wide association of writers -- poets, playwrights, essayists, editors, novelists -- with centers in Europe,

Asia, Africa, Australia and the Americas.

PEN believes in freedom of speech and freedom of the press and that literature, national though it be in origin, knows no frontiers, and should remain common currency between nations. But these basic freedoms have been abridged under the 1952 McCarran-Walter Act, which makes exclusion from this nation possible on grounds of ideological differences.

For example, Nobel Laureate Gabriel Garcia Marquez was first denied a visa to the United States in 1963; he finally received a provisional one in 1971. Internationally known writer Carlos Fuentes has been denied visas on several occasions, subjected to bureaucratic delays, and travel restrictions. Over a period of four

years, distinguished Italian dramatist Dario Fo was denied visas; in 1984, he was not admitted in time to participate in the rehearsal of his play, Accidental Death of an Anarchist, in New York. Popular Canadian nature writer Farley Mowat was refused admission to the United States in 1985 on unspecified "ideological" grounds. For the past two years, former American citizen Margaret Randall has been fighting deportation proceedings because I.N.S. Judge Martin Spiegel found her writing objectionable.

Reporters Committee for Freedom of the Press

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of news reporters and editors dedicated to

protecting the First Amendment interests of the news media and the public. Since its founding in 1970, the Reporters Committee has participated as amicus curiae in virtually every major First Amendment media law case before the U.S. Supreme Court, and in many media law cases in other federal and state courts.

The Reporters Committee has long been concerned that the exclusion of foreign journalists, writers, and scholars from the United States on ideological grounds will unconstitutionally restrict the free flow of information to the American people. In October 1986, the Reporters Committee protested the detention and expulsion of journalist Patricia Lara in letters to INS Commissioner Alan C.

Nelson, Attorney General Edwin Meese III, and Secretary of State George P. Schultz.[1]

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1. Counsel for petitioners and respondent have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The visa denials in this case are based on ideological discrimination against speakers and listeners because of the content of the proffered speech. This governmental action impermissibly infringes the basic rights of Americans to free speech and association under the First Amendment. The exclusion statutes involved in this case should be interpreted narrowly to square with these constitutional entitlements, and the visa denials overruled.

Moreover, these visa denials are contrary to the Helsinki Accords, the international law antecedent to the McGovern Amendment. The promotion of the free flow of persons and ideas across borders, a basic aim of the Helsinki Accords, is a principle which

should be used to interpret narrowly the statutory basis for these exclusions, and to overturn them.

ARGUMENT

Point I

THESE VISA DENIALS, WHICH ARE BASED ON IDEOLOGICAL GROUNDS, VIOLATE THE FIRST AMENDMENT

The constitutional interests in this case are well-established and as weighty as they can be. The First Amendment proscribes the enactment of legislation "abridging the freedom of speech." U.S. Const. amend. 1. This basic limitation on governmental power guarantees the right of Americans to speak and associate with others. The right to associate is inherent in the right of free speech. As the Supreme Court has explained "[w]hile the freedom of association is not explicitly set out in the Amendment, it has long been held

to be implicit in the freedoms of speech, assembly, and petition." Healy v. James, 408 U.S. 169, 181 (1972). The right of free association is general in its application, and "the Court has consistently disapproved governmental action ... denying rights and privileges solely because of a citizen's association with an unpopular organization." Id. at 185-86.

The First Amendment is a crucial aspect of democratic society. Free speech and association were conceived "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail...." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969). They necessarily extend to "ideas hateful to the prevailing climate of opinion...." Roth v. U.S., 354 U.S. 476, 484 (1956).

Free association is a prerequisite to the full and complete exercise of the right of free speech and expression. One has the right to hear unpopular views from those who proffer them, as it is not:

> enough that he should hear the arguments of adversaries from his own teachers, presented as they state them, and accompanied by what they offer as refutations. This is not the way to do justice to the arguments, or bring them into real contact with his own mind. He must be able to hear them from those who actually believe them; who defend them in earnest, and do their very utmost for them.

Red Lion, 395 U.S. at 392 n.18, quoting J.S. Mill, On Liberty 32 (R. McCollum ed. 1947). See also Kleindienst v. Mandel, 408 U.S. 753, 765 (1972) (government's contention that modern methods of communication may suffice "... overlooks what may be particular qualities inherent in sustained,

face-to-face debate, discussion and questioning").

The First Amendment "necessarily protects the right to receive..." information. Martin v. City of Struthers, 319 U.S. 141, 143 (1943), quoted in Lamont v. Postmaster General, 381 U.S. 301, 308 (Brennan, J. concurring) (1961). This extends to "[a]ll ideas having even the slightest redeeming social importance...." Roth, 354 U.S. at 484.

The right to receive information, including information from abroad and contact with visitors from other countries, is thus constitutionally protected. As Mr. Justice Brennan explained in finding unconstitutional a statute requiring allegedly "Communist political propaganda" sent through the mail to be intercepted and held by the

authorities: "the protection of the Bill of Rights goes beyond the specific guarantees to protect from Congressional abridgement those equally fundamental personal rights necessary to make the express guarantees fully meaningful." Lamont, 381 U.S. at 308. See also Stanley v. Georgia, 394 U.S. 557, 564 (1969) (the First Amendment rights to free speech and press necessarily includes the right to "receive information and ideas."); Aptheker v. Secretary of State, 378 U.S. 500 (1964) (statute requiring citizens to relinquish membership in proscribed organizations in order to exercise their right to travel violative of First Amendment).

The Constitution prohibits even restrictions on nonverbal elements involved in the exercise of free speech except where a "sufficiently important

governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms." U.S. v. O'Brien, 391 U.S. 367, 376-377 (1968). See also Tinker v. Des Moines School District, 393 U.S. 503 (1969) (wearing of armband in peaceful protest held to be action closely akin to "pure speech" and entitled to protection under the First Amendment).

Efforts to abridge basic First Amendment rights are to be strictly scrutinized and only compelling governmental interests can overcome these entitlements. See O'Brien, 391 U.S. at 377. Such restrictions are permitted only when (1) the restriction is within the constitutionally granted power of government, (2) there is an important or substantial government

interest unrelated to the suppression of free expression, and (3) the incidental restriction is not greater than necessary to accommodate the governmental interest. Id. at 377.

The Supreme Court has held that government may not restrict First Amendment freedoms under the Constitution "simply because it finds the views expressed by any group to be abhorrent." Healy, 408 U.S. at 187. The Court has even found a distinction between "the mere abstract teaching ... of the moral propriety or even moral necessity for a resort to force or violence" and "preparing a group for violent action and steeling it to such action." Brandenberg v. Ohio, 395 U.S. 444, 448 (1969), quoting Noto v. United States, 367 U.S. 290, 297-98 (1961). Under the First Amendment,

"undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." Police Department v. Mosley, 408 U.S. 92,101 (1972), quoting Tinker, 393 U.S. at 508.

The Court in Brandenberg enunciated the test for restrictions on First Amendment freedoms involving the advocacy of resort to force:

> the Constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to initiating or producing imminent lawless action and is likely to incite or produce such action.

Brandenberg, 395 U.S. at 447.

In the immigration context, the Court has yet to reconcile the clear First Amendment rights of American citizens with the traditional

power of the sovereign to bar aliens from entering its territory. The cases acknowledging the government's plenary power to exclude aliens are not relevant herein, for the rights of Americans were not at stake. See Fong Yue Ting v. United States, 149 U.S. 698 (1893); Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581 (1889). In Kleindienst v. Mandel, the question was only whether the Attorney General had a "facially legitimate and bona fide reason" to deny a waiver of admissibility to the alien, a Belgian Marxist who had been invited to several speaking engagements by American citizens.[2] Mandel, 408

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2. In those instances where the lower courts have applied the "facially legitimate and bona fide reason" standard to exclusionary activity, the judges have considered

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> themselves obliged to permit disclosure of the asserted "reasons" for exclusion. As the Court of Appeals explained:
>
> "the State Department may exclude someone simply by pointing to her membership in a subsection (28) organization; the additional, conclusory assertion that the organization has certain affiliations provides no safeguard because the assertion may be offered in every case and cannot be questioned or reviewed by any court .... A statement thus walled off from any effective challenge scarcely qualifies as a reason."

Abourezk v. Reagan, 785 F.2d 1043, 1058 n.20 (D.C. Cir. 1986). See also Harvard Law School Forum v. Shultz, 633 F. Supp. 525 (D. Mass. 1986); Allende v. Shultz, 605 F. Supp. 1220 (D. Mass. 1985); El-Werfalli v. Smith, 547 F. Supp. 152 (S.D.N.Y. 1982). But a facially-plausible "reason" is plainly insufficient to justify a visa denial given the weighty constitutional interests involved in ideological exclusions.

U.S. at 769. The Court upheld the waiver denial because of Mandel's violation of the conditions of a prior temporary visa. Id. at 769. The First Amendment question was one the Court determined to "neither address nor decide in this case." Id. at 770.

The application of 8 U.S.C. §1182(a)(27) in this case is unconstitutional.[3] The exclusions were based on the anticipated content

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3. Many additional aliens have been denied visas under 8 U.S.C. § 1182(a)(28), including Latin American authors Gabriel Garcia Marquez and Carlos Fuentes, African playwrights Dennis Brutus and Cosmo Pietersce, the Uruguayan literary essayist and literature professor Angel Rama, and Italian playwright Dario Fo. See Committee on Immigration and Nationality Law of the Association of the Bar of the City of New York, Visa Denials on Ideological Grounds: An Update, 8 Seton Hall Leg. J. 249, 252-59 (1984-85).

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of the speech to be proferred by the foreign visitors and there was no compelling governmental interest advanced to justify the abridgment of the First Amendment rights of American citizens. The only reasons other than membership in a subsection (28) organization offered by the government as grounds for exclusion were conclusory invocations of vague foreign

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Most recently, the deportation proceedings brought against writer Margaret Randall, as well as the incarceration for 44 days in August 1986 of a Japanese scholar, Choichiro Yatani, and the exclusion without a hearing in October 1986 of Patricia Lara, a Colombian journalist who was invited to attend an awards ceremony at the Columbia School of Journalism, has raised questions about the propriety and fairness of ideological exclusions. See NY Times, Nov. 13, 1986 at A 30, col. 1; Shapiro, Ideological Exclusions: Closing the Border to Political Dissidents, 100 Harv. L. Rev. 930, 933 n.23, 940 (1987).

policy concerns of the United States. Tomas Borge was excluded because his admission would be "'highly prejudicial to the foreign policy interests of the United States,'" Gov't Br. 8; Olga Finlay and Leonora Rodriguez Lezcano were excluded because their admission "would prejudice the foreign affairs of the United States," Gov't Br. 9; and Nino Pasti was excluded because his admission "would prejudice the conduct of United States foreign policy," Gov't Br. 10. But the existence of a nonverbal aspect of communication in the exercise of such speech, here "mere presence or entry," can not extinguish the constitutional considerations. Indeed, in this case, the "presence" and "entry" of the foreign visitors are indistinguishable from the rights to hear and associate with them.

Nor do conclusory assertions by the government of "foreign policy concerns" diminish the gravity of the abridgement of the First Amendment in this case. Similar governmental assertions have been found wanting when measured against the constitutional right to travel. See, e.g., Aptheker v. Secretary of State, 378 U.S. at 500; Kent v. Dulles, 357 U.S. 116, 125-27, 129-30 (1958).

The travel restrictions at issue in Aptheker and Kent, imposed for purported foreign policy reasons, were nonetheless scrutinized carefully because of the important constitutional interests involved. The Court has enunciated a "serious damage" test before foreign policy reasons can justify restrictions on the travel rights of American citizens. See Haig v. Agee, 453 U.S. 280, 306 (1981)

("serious damage" standard met and revocation of passport allowed when holder of passport planned to expose abroad American intelligence activities of which he had special knowledge).

The application of the ideological exclusion provisions in ways that are calculated to discriminate among speakers and listeners for political reasons infringes the basic protections of the First Amendment. Government action which is not content-neutral with respect to speech is unconstitutional. Regan v. Time, Inc., 468 U.S. 641, 648-49 (1984). The Court has recognized that:

> [t]he essence of . . . forbidden censorship is content control. Any restrictions on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide

> open." . . . There is an "equality of status in the field of ideas" and government must afford all points of view an equal opportunity to be heard . . . . Selective exclusions from a public forum may not be justified by reference to content alone.

Mosley, 408 U.S. at 96, quoting New York Times v. Sullivan, 376 U.S. 254, 270 (1964), and A. Meiklejohn, Political Freedom: The Constitutional Powers of the People 27 (1948). See also Carey v. Brown, 477 U.S. 455 (1980).

The Court must scrutinize whether the ideological exclusion provisions of the immigration statute are being applied in a neutral fashion in this case.[4] To justify exclusion, the governmental interests must be compelling and content-neutral.

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4. The statutory framework for the exclusions in this case are

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composed of a number of interrelated provisions. The provision pursuant to which the government excluded the four aliens in this case, 8 U.S.C. § 1182(a)(27), directs the exclusion of an alien if the Attorney General has reason to believe that the alien seeks "to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest or endanger the welfare, safety, or security of the United States." Furthermore, if the alien is found to be within the subsection (27) classification, exclusion is mandatory. Subsection (28) authorizes the exclusion, inter alia, of aliens who are, or at any time have been "members of ... the Communist Party of the United States ... the Communist ... party of any foreign state, or ... any ... affiliate ... of any such ... party." 8 U.S.C. § 1182(a)(28)(C) (1982). Unlike subsection (27), subsection (28) does not require the Secretary of State to exclude any alien who meets the stated criteria. If the Secretary recommends a waiver of ineligibility, then, in the discretion of the Attorney General,

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Any resulting restriction on First Amendment freedoms must not serve to stifle unnecessarily these basic individual liberties. See O'Brien, 391 U.S. at 377; Shelton v. Tucker, 364 U.S. 479, 488 (1960).

In this case, as has been shown, the visa denials were predicated

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> the alien may be admitted. 8 U.S.C. § 1182(a)(3)(A) (1982). The McGovern Amendment, 22 U.S.C. § 2691, provides that "the Secretary of State should, within 30 days of receiving an application for a non-immigrant visa by any alien who is excludable [under subsection (28)] ... but who is otherwise admissible to the United States, recommend that the Attorney General grant the approval necessary for the issuance of a visa ... unless the Secretary determines that the admission of such alien would be contrary to the security interests of the United States and so certifies to the Speaker of the House of Representatives and the chairman of the Committee on Foreign Relations of the Senate."

on the anticipated content of respondents' speech. As such, they violate the near-absolute proscription on abridgments of First Amendment rights.

Furthermore, the Court of Appeals was correct in holding that the language in subsection (27) is not susceptible to a reading that would permit exclusion solely for the "entry or presence" of the alien, and that subsection (27) must be read narrowly in conjunction with subsection (28) so that the presumptive waiver of admissibility under the McGovern Amendment is not nullified. Abourezk v. Reagan, 785 F.2d at 1053-57. This construction is mandated not only by accepted principles of statutory interpretation and construction, but also by the implacable force of the First Amendment.

Point II

THESE VISA DENIALS ARE ALSO INCOMPATIBLE WITH THE HELSINKI ACCORDS, THE INSPIRATION FOR THE McGOVERN AMENDMENT

The United States is one of the thirty-five signatory states to the Final Act of the Conference on Security and Co-Operation in Europe ("CSCE") which was signed in Helsinki on August 1, 1975.[5] The CSCE, which opened at Helsinki on July 3, 1973, was intended to broaden the process of detente and contribute to peace, justice and security in Europe by improving relations among the participating states.

The Final Act contains three main sections, (i) security in Europe,

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5. Department of State Bulletin of September 1, 1975, reprinted in 14 Int'l L. Mat. 1292 (1975).

(ii) cooperation in the fields of economics, science and technology, and the environment, and (iii) cooperation in humanitarian and other fields. The Western nations, including the United States, have always attached great importance to this third section, which is aimed at improving the free movement of people, ideas and information. Participation of these states in the CSCE was on condition that its scope be extended beyond questions of security, because they regarded the "rigid control of individual contacts and the dissemination of information as detrimental to European security interests." 122 Cong. Rec. 15,050 (1976).

The purpose of the third section regarding cooperation is to

facilitate "free movement and contacts, individually and collectively, whether privately or officially, among persons, visitations and organizations of the participating states, and to contribute to the solution of the humanitarian problems that arise in that connection." Specifically, according to the terms of the Final Act, the United States, as a participating state, has undertaken "gradually to simplify and to administer flexibly the procedures for exit and entry" and "to ease regulations concerning movement of citizens from the other participating states in [its] territory ...." 14 Int'l L. Mat. at 1314. In addition, there are provisions to improve the circulation of and access to information by, inter alia, encouraging lecture tours and other bilateral and

multilateral meetings with personalities and specialists from other participating states and to improve educational and scientific exchanges for students, teachers and scholars, including the facilitation of travel between the participating states.

The denial of visas to persons intending to travel to the United States for the purpose of speaking at universities and to other interested groups and otherwise participating in an exchange of information and ideas is, therefore, clearly contrary to the letter and the spirit of the Final Act. The whole thrust of the third section of the Act, to which the United States has always attached great importance, is to enable a cross exchange of ideas and information between different countries and to

permit citizens to hear the views of those having different beliefs and cultural backgrounds from their own. See Implementation of the Helsinki Accords: Hearings before the Commission on Security and Cooperation in Europe, 96th Cong., 1st Sess. 1 (1979). To deny visas to individuals on the very basis of such beliefs is to deny the principles that lie at the heart of the Helsinki Final Act -- principles which the United States and other Western nations fought to uphold and have reflected in the text of the agreement.

The Final Act was codified in principle by Congress in the McGovern Amendment. The intent of Congress was to conform United States immigration law to the goal of free exchange of ideas across borders articulated in the

Helsinki Accords. See 22 U.S.C. § 1291(a)(1982); S. Rep. No. 194, 95th Cong., 1st Sess. 13 (1977) (The purpose of the McGovern Amendment was to "facilitate 'statutory United States compliance with the provisions of the Final Act of the Conference on Security and Cooperation in Europe' . . . which call for a reduction in barriers to the free movement of people and ideas."); Abourezk, 785 F.2d at 1057-58, 1058 n. 17.

While the Final Act is not a document which is, in itself, binding in the sense of a treaty, it was and is considered by the signatories to be morally binding as a statement of mutual intent concluded at the highest levels. In addition, provisions closely follow many of the accepted norms of international law which have

developed by custom and practice into rules of binding customary international law.[6]

Furthermore, the United States not only has clearly indicated its own commitment to the provisions of the Final Act, but also has repeatedly criticized other participating states,

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6. Article 19 of the Universal Declaration of Human Rights states that everyone has the right to freedom of opinion and expression which includes the right "to seek, receive and impart information and ideas through any media and regardless of frontiers" [emphasis added]. U.N. Doc. A/801 (1948). See Restatement of the Foreign Relations Law of the United States, § 702 (Tent. Draft No. 2, 1982). Comment b to Section 702 makes it clear that where human rights norms have evolved by reason of state practice, including as embodied in the international instruments, such customary legal principles are "part of the law of the United States to be applied as such by State as well as federal courts."

in particular many of the Eastern European countries, for their failure to implement these provisions and to abide by the terms of the Act.

President Gerald Ford, on the occasion of the signing of the Final Act, said in his speech,

> we take this work and these words [of the Final Act] very seriously. We will spare no effort to ease tensions and solve problems between us. But it is important that you recognize the deep devotion of the American people and their Government to human rights and fundamental freedoms and thus to the pledges that this Conference has made regarding the freer movement of people, ideas and information.

121 Cong. Rec. 28,036 (1975). Echoing these sentiments, President Carter, in his speech to the United Nations in March of 1977, emphasized the importance of a more universal respect for fundamental human rights and added, "[t]o demonstrate that commitment, we

are moving now to liberalize almost completely travel opportunities to America."[7] The denial of visas on ideological grounds is in clear contradiction to these statements.

In order to monitor the implementation of the Helsinki Accords, a Congressional Commission on Security and Cooperation in Europe was created in 1976. This body has examined the issue of visa denials in the United States, and has pointed out that it is hypocritical for the United States to criticize other states for their failure to implement the Accords when it is itself guilty of this failure to

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7. Implementation of the Helsinki Accords: Hearings before the Commission on Security and Cooperation in Europe, supra p. 40, at 1.

honor the terms of what it upholds as an international obligation.[8]

Thus, the United States, by signing the Helsinki Final Act and by encouraging other defaulting signatory states to observe their commitments, clearly espouses foreign policy aims inconsistent with the use of subsection (27) to exclude foreign academics, artists and intellectuals. See Carliner, United States Compliance with the Helsinki Final Act: The Treatment of Aliens, 13 Vand. J. Transnat'l L. 397 (1980). The use of this provision ultimately frustrates the aims of peace and security which the CSCE was designed to facilitate.

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8. See authority cited in note 7, passim.

The need to interpret the McGovern Amendment[9] to be consistent with the Final Act comports with the settled principle of statutory interpretation that domestic statutes be interpreted, wherever possible, consistently with international law. See Restatement of Foreign Relations Law of the United States, § 134 (Tent. Draft No. 6, 1985). The Final Act, while not strictly a statement of binding international law, represents an international commitment of the United States and, as such, should be interpreted to be consistent with the Final Act.

This Court should therefore interpret subsections (27) and (28), together with the McGovern Amendment,

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9. See note 4, supra.

in light of the letter and the spirit of the Final Act. This goal can be achieved by interpreting the McGovern Amendment to require a showing, supported by concrete evidence, that an alien is excludable under subsection (27) for reasons distinct from his membership in a subsection (28) organization. Such an interpretation would require that the visa denials in this case be overruled.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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